IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1371

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,

Petitioners,

against

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Petitioners,

against

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, WILLIAM D. MEISSER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County.

Respondents.

BRIEF FOR RESPONDENTS, COMMISSIONERS OF ELECTIONS FOR NASSAU COUNTY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND TO MOTION FOR SUMMARY REVERSAL AND TO EXPEDITED APPEAL.

JOSEPH JASPAN
County Attorney of Nassau County
Attorney for Respondents *William D. Meisser and Marvin D. Cristenfeld, Commissioners of Elections for Nassau County.*
Nassau County Executive Building
Mineola, New York 11501
(516) 535-3603.

Kemp Hannon,

INDEX

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Statement of the Case

Plaintiff Stephen Eisner is a duly registered voter in the County of Nassau and is 22 years of age. He first became eligible to register to vote and to enroll in a political party on December 30, 1970, when he attained his 21st birth-

day. Plaintiff, however, failed to exercise his privilege to register to vote and his privilege to enroll in a political party for almost an entire year. If he had exercised his right to register and to vote during 1971, he would now be eligible to vote in the June 1972 primary.

During the period from Eisner's 21st birthday until the last day on which plaintiff could have enrolled so as to be eligible for the June 1972 primary, the Nassau County Board of Elections was open for the purposes of registration and enrollment at the following times:

1. From January 1, 1971, to August 14, 1971, during business hours five days a week.

2. On September 30, October 1 and October 2, 1971, at Eisner's local polling place in Nassau County.

3. At various locations throughout the County, including several nearby to Eisner's residence, when the Nassau County mobile registration unit was opened for local registration.

4. If Eisner was unable to register by the above means, the provisions of New York *Election Law* § 153-a were available to the plaintiff for absentee registration.*

Plaintiff Eisner, however, failed to exercise his privilege to register and enroll during 1971, and on December 13, 1971, he visited the Nassau County Board of Elections and registered to vote. He therefore qualified to cast a ballot at the November 1972 general election November 7, 1972. After registering to vote, he completed an enrollment blank and deposited the same in a sealed box which is maintained solely for the receipt of completed enrollment blanks.

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* Plaintiff's assertion in his petition at 6 n. 1 that such enrollment was not possible is erroneous.

The usual rule thereafter is that the enrollment blanks are not removed from the sealed box until the Tuesday following the next general election (*Election Law*, §186). Exceptions to the usual rule are provided for in *Election Law* § 187, whereby those eligible for "special enrollment" have their choice, as to a political party, placed immediately upon the enrollment register. They may immediately partake in all the activities of the party of their choice. If plaintiff Eisner had enrolled in the nine-month period prior to the general election in 1971, he would have been eligible for "special enrollment" and could have even voted in the September 1971 party primary (*Election Law*, § 187[2][a]), besides now being eligible to participate in the June 1972 primary.

Mr. Eisner's failure to register when he was eligible for special enrollment, and non-qualification to be eligible by special enrollment under any of the other provisions of Section 187 of the *Election Law*, now place him under the operation of Section 186. Because of this close interrelationship of Sections 186 and 187, one section cannot be considered unless the operation of the other is also weighed.

The Election Law of New York therefore sets out a registration procedure which enables all eligible voters to easily qualify to cast their ballot in a general election. The Election Law also sets forth a simple enrollment qualification involving the principle of "delayed enrollment" (§186) with certain logical exceptions, i.e., "special enrollment" (§187).

POINT I

The Court of Appeals' decision is in accord with this Court's decisions.

The ultimate goal sought by petitioners herein is participation in a party primary election. The fundamental

right of voting in a general election is not involved in this case.

A primary election is inherently different from a general election in New York as New York has a "closed primary" (See 25 Am. Jur. 2d, Elections, §148). Discrimination is involved in the very nature of a closed primary in that only enrolled members of a political party may participate in that party's primary.

This Court has held, for general elections, that "states have the power to impose reasonable citizenship, age and residency requirements on the availability of the ballot". *Kramer* v. *Union Free School District*, 395 U. S. 621, 625.

For a primary election, open only to members of one political party, additional qualifications are necessary in order to insure that *bona fide* adherents of a party participate in that party's primary.

Unless some test for genuine adherence is utilized, there is always the danger of one party raiding another one party. New York has four statutory (Election Law §2(4)) political parties: Conservative, Democrat, Liberal and Republican. The Conservative and Liberal parties each have slightly over 100,000 enrollees while the Republican party has approximately 3,000,000 enrollees and the Democratic party has approximately 3,500,000. The possibility of a raid is ever present, especially because the "minor" parties at times can represent the deciding votes in elections; or, as is presently the case, can represent a balance of power in the State Assembly; and their nomination has even been the vehicle for election to a major post as was the case with the Liberal Party nomination in the 1969 New York City Mayoralty election and with the Conservative Party nomination in the 1970 United States Senate election.

New York's additional qualifications involve the completion of an enrollment blank (*Election Law* §174) and

deferment in participation until after the occurrence of the next general election. Such procedure is a minimal requirement for demonstrating party allegiance. The petitioners' suggested alternative, the use of the *Election Law* §332 hearing, would involve a large number of hearings to be reviewed by a court (on the question of an individual's political beliefs) if it were to be used as a substitute for "delayed enrollment." Such procedure would be cumbersome and unlikely to act as a deterrent to raiding. It could also be the chilling instrument of abuse against genuine party insurgents.

New York's delayed enrollment procedure is actually a minimal procedure which is precisely tailored to accomplish its goal.

It should be noted that delayed enrollment has logical exceptions for those who would be the least likely to participate in such raiding. These exceptions, embodied in section 187 of the *Election Law*, allow, *inter alia*, new voters to participate fully in a political party as soon as they attain voting age (§187[2][a]).

POINT II

The relief sought by the petitioners is too broad.

The scope of the relief sought by the petitioners should be limited to those who are in a similar situation to the petitioners, namely, those who were eligible for special enrollment because they had attained voting age since the last general election (Election Law §187[2][a]), but did not avail themselves of the opportunity to do so, so that now they must follow the general requirements of Section 186 of the Election Law.

Factually, the petitioners fall far short of challenging New York's delayed enrollment system, since they are

neither cross-over enrollees nor are they newly established residents of the County.* Moreover, the petitioners do not even represent that class of which they are a member, as the action they brought was simply for a declaratory judgment; it was not brought pursuant to Federal Rule 23.

These limitations on their non-representation of a class also demonstrate the inappropriateness of their motion for summary reversal.

POINT III

"Delayed enrollment" is not an abridgement of the right to travel.

The petitioners challenge delayed enrollment on the basis that it requires those who have recently established a residence to wait until the next general election for their enrollment to become effective. Such a challenge, however, is anomalous in that none of the petitioners herein fall under such a description. Moreover, this was the sole question in *Jordan* v. *Meisser, supra* which this Court has dismissed for lack of a substantial federal question.

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* This Court, in *Jordan* v. *Meisser, et al.*,—U.S.—, 31 L Ed.2d. 92, 40 U.S.L.W. 4213, dismissed, for want of a substantial federal question, was an attack on Sections 186, and 187 by a new resident of Nassau County. The effect of the Court's dismissal has been the subject of debate in this case, inasmuch as the MOTION TO DISMISS OR AFFIRM by the Attorney General of the State of New York had inadvertently asserted appellant Jordan's right to special enrollment by Election Law Section 187(2)(c), whereas the MOTION TO DISMISS OR AFFIRM by the County Attorney of Nassau County had correctly cited the bar of Election Law §187(6) to Mr. Jordan, which thus placed him under the operation of Election Law §186, and thus also raised the identical questions presented in the instant case. It is our contention that the dismissal in *Jordan, supra*, was on the merits (STERN AND GRESSMAN, *Supreme Court Practice* (4th Ed. 1969) §5.18 at 233) and should control in the instant case.

The petitioners cite Chief Judge Mishler's decision, which noted that the wait involved, because of delayed enrollment, varied in duration from one to eleven months (*Pet. brief*, p. 14, n. 8; also referred to at *Pet. brief*, p. 18). The delay resulting from *Election Law* §186 is not a result of a durational residence requirement, rather, it is due to the inherent delay which results from the fact that only one primary and only one general election are held each year. Indeed, petitioner Eisner, had he specially enrolled when he first became of voting age on his 21st birthday in December of 1970, would have had to wait over nine months until he could have participated in the only primary in New York in 1971, the one held on September 14, 1971. Therefore, delayed enrollment is not a durational residence requirement rather, it is a minimal safeguard against unwarranted political chicanery; it prevents electoral fraud and the integrity of its political processes—goals which this Court has upheld in two recent cases, *Dunn* v. *Blumstein*, —U.S.—, 31 L Ed.2d 274, 40 U.S.L.W. 4269, 4274, *Bullock* v. *Carter*, —U.S.—, 31 L Ed.2d 92, 40 U.S. Law Week 4211, 4215.

The concept of a "grandfather clause" has no applicability to delayed enrollment. The petitioners have alleged that "New York has established a 'grandfather clause' which conditions full participation in the 1972 Presidential election upon past participation in 1971 local elections." *Pet. brief*, p. 23. This premise of the petitioners misconstrues New York's Election Law, inasmuch as there is *no* requirement that the petitioners had to have been involved in the 1971 local elections. All that is required is that an individual's registration and enrollment have taken place prior to the 1971 general election. No requirement is made as to actual participation in the 1971 election, however, and under the provisions of permanent personal registration (Article 15, Election Law), which has been adopted in the County of Nassau and in many other counties of

New York State, including the five counties which make up New York City, it is expressly envisioned that an individual need not vote at each general election in order for his registration to remain continuously in effect. Instead, under *Election Law* §352, as long as an individual votes in a general election "at least once in each period of two successive calendar years", he remains qualified to vote.*

The contention of the plaintiffs that delayed enrollment has an adverse effect upon unregistered members of a racial or ethnic minority is a *non sequitur*. Beginning from the premise that because fewer than fifty per cent of the qualified voters in New York, Kings and Bronx Counties participated in the 1970 general elections, the petitioners conclude that delayed enrollment perpetuates their exclusion from the democratic processes by rendering them ineligible to vote in the June primaries. There is no provision under New York's Election Law whereby the casting of a ballot in a general election would provide eligibility for participation in a subsequent primary. Thus, eligibility for the June primary is conditioned not on the prior casting of a ballot, but rather the timely completion of an enrollment blank.

POINT IV

Expeditious relief should not be granted.

The principle of "delayed enrollment" is a key provision in New York's Election Law, and involves a major policy decision in a state where a vigorous *four* party process exists.

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* Intra-county changes of residence require a new registration, but not a new enrollment; inter-county changes of residence require both a new registration and re-enrollment.

Judicial scrutiny of such provisions is always welcome to insure that an individual's constitutional rights are protected; yet consideration of "delayed enrollment", under hurried conditions and motivated by partisan purposes (as is evidenced by the brief of the Lawyers for McGovern), is not a procedure which will allow full and complete consideration of all issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Mineola, New York
May 23, 1972

Respectfully submitted

JOSEPH JASPAN
County Attorney of Nassau County
Attorney for Respondents *William D. Meisser and Marvin D. Cristenfeld, Commissioners of Elections for Nassau County.*
Office and Post Office Address
Nassau County Executive Building
Mineola, New York 11501
(516) 535-3603.

J. Kemp Hannon,
Deputy County Attorney,
Of Counsel.